IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 197

JOHN WILLIAM BUTENKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF PETITIONER, JOHN WILLIAM BUTENKO

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Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 384 F.2d 554, and is printed in the Appendix to the Petition for Certiorari.

Jurisdiction

Petitioner was convicted of conspiracy to transmit to the Soviet Union information relative to the national defense of the United States. The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1). On June 17, 1968, this Court granted certiorari limited to certain questions.

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Questions Presented

This Court's grant of certiorari was limited to the following questions:

> "On the assumption that there was electronic surveillance of petitioner or a codefendant which violated the Fourth Amendment,

(1) Should the records of such electronic surveillance be subjected to *in camera* inspection by the trial judge to determine the necessity of compelling the Government to make disclosure of such records to petitioner, and if so to what extent?

(2) If *in camera* inspection is to be authorized or ordered, by what standards (for example, relevance, and considerations of national security or injury to persons or reputations) should the trial judge determine whether the records are to be turned over to the defendant?

(3) What standards are to be applied in determining whether petitioner has standing to object to the use against him of information obtained from such illegal surveillance? More specifically, if illegal surveillance took place at the premises of a particular defendant,

(a) Does that defendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?

(b) Does a codefendant have standing to object to the use against him of any or all information obtained from the illegal surveillance, whether or not he was present on the premises or party to the overheard conversation?" *Butenko* v. *United States*, 390 U.S. ——, 88 S. Ct. 2293-94 (1968).

Statement of the Case

Petitioner, John William Butenko, along with codefendant, Igor H. Ivanov, were convicted in the United States District Court of New Jersey on an indictment charging the codefendants of conspiring together and with Gleb A. Pavlov, Yuri Romashin and Vladimir I. Olenev, unindicted co-conspirators (enjoying diplomatic immunity from prosecution) to transmit to the Soviet Union information relating to the national defense of the United States in violation of 18 U.S.C. §794(a) and (c) (count I). The defendants were also convicted for conspiring to cause petitioner to act as an agent of the Soviet Union without prior notification to the Secretary of State in violation of 18 U.S.C. §951 (count II). In addition, petitioner was convicted of a substantive violation of 18 U.S.C. §951 (count III). Butenko received concurrent sentences of 30 years, 10 years and 5 years imprisonment on the three counts on which he was convicted; Ivanov received concurrent sentences of 20 years imprisonment on count I and 5 years on count II. The Court of Appeals for the Third Circuit affirmed the conviction of Butenko on all counts, affirmed the conviction of Ivanov on count I, but set aside his conviction on count II. *United States* v. *Butenko*, 384 F.2d 554 (3d Cir. 1967). Subsequently, petitioner sought and was granted certiorari by this Court, the grant of certiorari being limited to the aforesaid questions presented.

Petitioner's position is that the records of illegal electronic surveillance involving petitioner or a codefendant including unindicted co-conspirators should not be subjected to an *ex parte*,[1] *in camera* inspection by the trial judge to

[1] The term *"ex parte"* is used throughout this brief to describe an inspection of the records of illegal electronic surveillance by

determine the necessity of compelling the Government to make disclosure of such records to petitioner, nor should the turn-over of such records be controlled by the doctrine of standing. Rather, petitioner's position is that all the records of the illegal electronic surveillance involving petitioner, a codefendant and the unindicted co-conspirators, including the logs of monitored conversations, summaries of the logs, and all memoranda derived from the logs and summaries should be turned over directly to petitioner. After petitioner and his counsel have thoroughly examined the records, there should be a full adversary hearing to determine whether any of the Government's evidence introduced at petitioner's trial was derived directly or indirectly from illegal electronic surveillance.

The Solicitor General's position is that the records of any electronic surveillance including that of a defendant's conversations or of a defendant's premises should initially be produced *in camera* for examination by the trial judge, presumably *ex parte*. Then, after reviewing the records, the trial judge would turn over to petitioner only those records which the judge found to have some "relation" or "relevance" to petitioner's prosecution, or would order any further proceedings which he deems appropriate. See Memorandum for the United States on the Motion to Amend, *Kolod* v. *United States*, No. 133, October Term, 1967.

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the trial judge alone, without the safeguards of an adversary proceeding as would be assured by the presence of defense counsel. See Point I, *infra*.

Summary of Argument

The records of electronic surveillance should not be subjected to an *ex parte, in camera* inspection by the trial judge. Such procedure is contrary to present standards which have been established by this Court to assure the fair administration of criminal justice. Due to the extent and complexity of the Government's program of illegal electronic surveillance, it is improbable that even the most experienced and conscientious trial judge will be able to determine *in camera* and *ex parte* whether any of the Government's evidence is tainted with illegality. Only defense counsel, equipped with all the records of electronic surveillance at a full adversary hearing, can adequately perform the function of purging the Government's case of illegally-gathered evidence.

In addition, an *ex parte, in camera* proceeding violates petitioner's right to a public trial, his right to cross-examine and confront the witnesses against him, and his right to the assistance of counsel, as guaranteed by the Sixth Amendment. These guaranties apply to suppression hearings to determine whether the Government's evidence is tainted with illegal electronic surveillance.

The presence in this case of a national security issue does not lead to a contrary result. When the Government chooses to prosecute an individual, it cannot invoke a claim of privilege to deprive the accused of anything which might be material for his defense. However, the Government, upon a sufficient showing at a closed adversary hearing that national security is at stake, may obtain from the court a protective order that there be a private but fully adversary

hearing to determine whether the prosecution's case is tainted with illegal evidence.

Prior to the adversary hearing, defense counsel must be equipped with all the Government's records of electronic surveillance which form part of the Government's investigative file on petitioner. Although there may be a danger of injury to innocent third persons by such full disclosure, the rights of these persons may be adequately protected through use of protective orders, the contempt power, and private hearings. Contrary, there is no way of protecting petitioner other than by full disclosure of all the records. Thus, on balance, petitioner's right to protect himself from illegal governmental conduct outweighs the possible invasion of privacy of third persons.

Petitioner has standing to object to the direct or indirect use against him of all of the above records of electronic surveillance whether or not the surveillance took place at his premises, at the premises of indicted or unindicted co-conspirators, or at the premises of innocent third persons, and whether or not he was a party to the overheard conversations. Under traditional theory: (1) petitioner has standing to object to surveillance at his premises regardless of whether he was present on the premises or a party to the overheard conversations; (2) petitioner has standing to object to surveillance at anyone's premises if petitioner was present on the premises or a party to the overheard conversations; (3) moreover, several decisions of this Court and other courts support the position that petitioner would have standing to object to information obtained by surveillance at the premises of a codefendant or unindicted co-conspirator even though petitioner was not present on the searched premises or a party to overheard conversations.

However, to afford petitioner standing in this last situation, or as to third persons, the Court may have to modify or abolish the traditional doctrine of the personal nature of Fourth Amendment rights. In order to fully effectuate the purposes of the exclusionary rule—the deterrence of illegal police conduct and the imperative of judicial integrity—the Court must give petitioner standing to object to the use against him of any illegally-gathered evidence, regardless of its source. Otherwise the Court would give government officials an incentive to invade the rights of privacy of third persons in order to use the evidence thereby obtained against an accused. Moreover, a ruling which permits the admission against petitioner of evidence seized in flagrant violation of a third person's Fourth Amendment rights has the necessary effect of condoning the illegal conduct which produced the evidence, and puts a premium on lawlessness at a time when "law and order" is the cry of the day.

ARGUMENT

I.

The Proposed Hearing Procedure Is Contrary to Present Standards Which Have Been Established by This Court to Assure the Fair Administration of Criminal Justice.

The Government's position is contrary to established notions concerning the fair administration of criminal justice announced by this Court in *Jencks* v. *United States,* 353 U.S. 657 (1957) and most recently reiterated in *Dennis* v. *United States,* 384 U.S. 855 (1966).

Jencks held that the defense in a federal criminal prosecution was entitled to obtain for impeachment purposes statements which had been made to government agents by government witnesses touching the events and activities as to which they testified at trial. The court further held that

> ". . . the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." 353 U.S. at 668-69.

The Court expressly disapproved of *ex parte, in camera* inspection by the trial judge for his determination of relevancy and materiality:

> "The practice of producing government documents to the trial judge for his determination of relevancy

and materiality, without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—*e.g.*, evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. . . ." 353 U.S. at 669.

Shortly after the *Jencks* decision, Congress enacted the so-called "Jencks" Act, 18 U.S.C. §3500, to govern the production of statements made to government agents by government witnesses. "One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of *Jencks* would compel the undiscriminating production of agent's summaries of interviews regardless of their character or completeness." *Palermo* v. *United States*, 360 U.S. 343, 350 (1959).[2] Thus in *Palermo*, on the basis of the Jencks Act, the Court denied production to the defense of a 600-word memorandum summarizing parts of a 3½-hour interrogation of the witness by a government agent on the basis that such memorandum was not a "statement" which was required to be produced

[2] "Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." *Palermo* v. *United States*, 360 U.S. 343, 350 (1959).

under the definition of "statement" contained in 18 U.S.C. §3500(e).

However,

> ". . . Congress took particular pains to make it clear that the legislation 'reaffirms' . . . [the *Jencks*] holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a government witness has testified at the trial. S. Rep. No. 981, 85th Cong. 1st Sess., p. 3. And see H.R. Rep. No. 700, 85th Cong., 1st Sess., pp. 3, 4." *Palermo* v. *United States*, 360 U.S. 343, 361 (1959) (concurring opinion).

The Court's disapproval in *Jencks* of *ex parte, in camera* proceedings to determine relevancy of statements for impeachment purposes was not altered by this Court's statement in *Palermo*: "[W]hen it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination." 360 U.S. at 354. Rather, the Court was concerned with maintaining the statutory purpose of the Jencks Act of limiting production to the defense of "statements" as defined by 18 U.S.C. §3500(e):

> "The Act's major concern is with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which do not satisfy the requirements of (e), or do not relate to the subject matter of the witness' testimony. It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." 360 U.S. at 354.

Once the trial judge determines that the document is a "statement" within the purview of 18 U.S.C. §3500(e), "whether the statement may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself." *Scales* v. *United States,* 367 U.S. 203, 258 (1961).

Be that as it may, the fact remains that the Jencks Act as construed and applied in *Palermo* and *Scales* reflects a retreat from the position of full disclosure to the defense required by the *Jencks* decision. The retreat was deemed necessary because required by a Congressional enactment involving no constitutional barrier, *Palermo* v. *United States,* 360 U.S. 343, 353 n.11 (1959), raised by the *Jencks* decision which was "not put on constitutional grounds." *Palermo* v. *United States, supra,* at 362 (concurring opinion); accord, *Scales* v. *United States,* 367 U.S. 203, 257-258 (1961). In the absence of a statute expressly requiring *in camera* inspection, this Court in other situations adheres to the *Jencks* case policy of full disclosure to the defense while leaving questions of the admissibility in evidence of the disclosed material to the Court.

The Court's disapproval of *ex parte, in camera* proceedings was again asserted in *Dennis* v. *United States,* 384 U.S. 855 (1966), where the Court addressed itself to the disclosure to the defense of a witness' grand jury testimony, for the purpose of impeachment.

Dennis noted that the trend toward more expansive disclosure to the defense of a witness' grand jury testimony for the purpose of impeachment is

> "entirely consonant with the growing realization that disclosure, rather than suppression, of relevant ma-

terials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act. 18 U.S.C. §3500 (1964 ed.), responding to this Court's decision in *Jencks* v. *United States,* 353 U.S. 657, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony. It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice." 384 U.S. at 870-71.

Furthermore, the Court noted that in a conspiracy case, with its inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants,

"it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." 384 U.S. at 873.

The Court commented upon the practice of some of the Courts of Appeals of permitting an *ex parte, in camera* inspection by the trial judge of grand jury minutes of the testimony of a witness called by the prosecution at trial:

"While this practice may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony—and we do not disapprove of it for that purpose—it by no means disposes of the matter. Trial judges ought not to be burdened with the task or the responsibility of examining some-

times voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' *Pittsburg Plate Glass,* 360 U. S., at 410 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this regard is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut dangers to individuals who are identified by the testimony produced. Cf. Fed. Rule Crim. Proc. 16(e), as amended in 1966; 18 U.S.C. §3500 (c)." 384 U.S. at 874-875.

Accord, *United States* v. *Youngblood,* 379 F.2d 365 (2d Cir. 1967); *United States* v. *Coplon,* 185 F.2d 629, 636-640 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952); *United States* v. *Baker,* 262 F. Supp. 657, 665 n.5 (D.D.C. 1966), motion to dismiss indictment and suppress evidence denied, 266 F. Supp. 456 (D.D.C.), motion for new trial

denied, 266 F. Supp. 461 (D.D.C. 1967), appeal pending, No. 21154 (D.C. Cir.).

The reasons for permitting defense counsel rather than the trial judge to inspect all records of illegal electronic surveillance, including the logs of monitored conversations, summaries of the logs, and all memoranda derived from the logs and summaries are more compelling than in regard to the grand jury testimony in *Dennis* or the FBI reports in *Jencks*. If "it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness," *Dennis* v. *United States*, 384 U.S. 855, 874 (1966), it is even more difficult for a trial judge to evaluate a mass of electronically-obtained data together with leads and other information thereby obtained in an effort to determine whether the prosecution's evidence is tainted with illegal electronic surveillance. At least when inspecting grand jury minutes or witnesses' statements, the judge can look at the material of one witness at a time while the witness' testimony is still fresh in his mind, while records of electronic surveillance afford no such confinement or freshness of memory.

Because of the extent and complexity of the government's illegal electronic surveillance programs "it will be extremely difficult for even the most able and experienced trial judge" to determine *in camera* and *ex parte* whether any of the Government's evidence is tainted with illegality. The extent and complexity of the Government's activity has been fully analyzed in the Brief for Petitioners on Motion to Modify, *Kolod* v. *United States*, No. 133, October Term, 1967, pp. 7-12. As indicated therein:

1. "[T]he government apparently assumes that all *leads* from conversations picked up over an electronic device are clearly identifiable as such and will concern the same subject matter as the conversation itself. This is manifestly not the case. . . . The change in character and subject matter of the investigative leads and the mixing of information from many sources is most likely to take place in the type of investigations conducted by the FBI with the aid of electronic devices. Many such investigations were 'intelligence type investigations' where no particular violation of federal law was being pursued. Moreover, one of the FBI procedures in such an investigation is to build dossiers on the names of associates of the investigative target. Thus the mere mention of a name over the device may lead to a dossier on that person and his relationship to the target on subject matters unrelated to the conversation heard over the device. If these new matters are relevant to a later prosecution, analysis of the microphone logs will never reveal it."

2. "Further complicating the issue of any *in camera* inspection by the trial judge is the simple difficulty in identifying the illegally seized material and leads therefrom once they have been commingled with other information in the investigative files without the assistance of live witnesses."

3. "A further issue which no judge could decide *in camera* is the relationship of the illegally seized material and leads therefrom to the decision-making process as it affects the progress of the criminal investigation."

4. "Finally, the Internal Revenue Service method of electronic surveillance is even less susceptible to *in camera* judicial resolution" as illustrated in *McGarry* v. *United States,* No. 1184, October Term, 1967, Supreme Court of the United States, which is now pending before this Court on petition for writ of certiorari.

Moreover, in accord with the pronouncement in *Dennis,* it is not realistic to assume that the trial judge's *in camera* inspection of the records of electronic surveillance, however conscientiously made, would exhaust all the possible avenues of inquiry which defense counsel would pursue if he were equipped with the surveillance record. In our adversary system, weight should be given to the ingenuity of defense counsel since the determination of what may be useful to the defense can properly and effectively be made only by an advocate. *Dennis* v. *United States,* 384 U.S. 855, 875 (1966); see *United States* v. *Coplon,* 185 F.2d 629, 636-40 (2d Cir. 1950) (L. Hand, J.), cert. denied, 342 U.S. 920 (1952) (cited with approval on this very point, *Dennis* v. *United States,* 384 U.S. 855, 875 n.22 (1966)); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant,* 74 Yale L.J. 136, 148-49 (1964). It is no disparagement to say that usually the judge does not know enough about the case at the time he must determine whether the illegal surveillance led directly or indirectly to any of the prosecution's evidence. See *id.* at 148. Before trial, he is less knowledgeable than the parties, particularly in criminal proceedings presenting complicated issues. *United States* v. *Cobb,* 271 F. Supp. 159, 163 (S.D.N.Y. 1967). In order to inform himself adequately, the judge would have to postpone really important sup-

pression issues until trial, contrary to the spirit and intention of Rule 41(e) of the Federal Rules of Criminal Procedure. Otherwise, the Judge's decision would be no more than a mere guess. For an illustration of the judge's inability to know how the case will develop at trial, see the recent case of *United States* v. *Baker*, 262 F. Supp. 657 (D.D.C. 1966), appeal pending No. 21154 (D.C. Cir.), as analyzed in Brief for Petitioners on Motion to Modify, *Kolod* v. *United States*, No. 133, October Term, 1967, pp. 18-19.

In short, the trial judge simply ought not to be burdened with the task or the responsibility of examining sometimes voluminous records of electronic surveillance in order to ascertain whether the illegal surveillance led to any of the prosecution's evidence. See *Dennis* v. *United States*, 384 U.S. 855, 874 (1966). It is to be doubted that the trial judge can afford the time and effort involved to examine numerous logs of monitored conversations, involving in some instances hundreds of hours of transcription, as well as the summaries of these logs and memoranda derived from the logs and summaries. After examination of this mass of information, it would then be necessary to examine each piece of evidence to be introduced, each witness to be called, and perhaps even the questions to be put to these witnesses, to determine the nature of their derivation. The time and effort thus involved would make the approach suggested by the Solicitor General impractical. Pitler, *Eavesdropping and Wiretapping—The Aftermath of Katz and Kaiser: A Comment*, 34 Brooklyn L. Rev. 223, 244-45 (1968); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L.J. 136, 148 (1964).

But above and beyond the burden an *in camera* inspection imposes upon a judge, the procedure must lead to serious error and failure of due process. As was said by Mr. Justice Jackson in *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, 224-225 (1953) (dissenting opinion): "Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration."

Petitioner does not know whether it was a distrust of *ex parte* proceedings that impelled Congress not to adopt *ex parte* procedure in Title III (Wiretapping and Electronic Surveillance) of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 (June 19, 1968), reported in *United States Code Congressional and Administrative News,* 90th Cong. 2d Sess., pp. 1511-28 (1968) [hereinafter cited as Crime Control Act]. §2518 (10)(a) of the Act provides that in any suppression hearing "The Judge . . . may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." Of significance is the fact that Congress did not use the term *in camera,* a term expressly used in the Jencks Act. The omission of this term from the 1968 Act indicates that Congress has rejected the *in camera* standard of the Jencks Act and supports the contention that an adversary proceeding is required. The congressional policy evinced by the 1968 Act on the subject of electronic surveillance should further condemn the government's quest for *ex parte, in camera* proceedings on this subject.

Another basis for rejecting an *ex parte, in camera* procedure is found in the nature of the right asserted by petitioner as compared with the right protected in *Jencks* and *Dennis*. *Jencks* and *Dennis* involve relatively simple trial problems relating to the credibility of witnesses. The liberal turn-over of material to the defense for utilization at trial in those situations is based on the principle that "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis* v. *United States*, 384 U.S. 855, 870 (1966). Much more is involved in the case at bar: Petitioner seeks to vindicate a constitutional right which has been violated. To deny petitioner open access to material to enable him to vindicate his constitutional right demotes a Fourth Amendment right below that afforded to an accused who merely seeks evidence in the hands of the prosecution for impeachment purposes. This demotion not only makes the Fourth Amendment mere words, but also deprives petitioner of his Sixth Amendment rights.

II.

The Proposed Hearing Is in Violation of Petitioner's Sixth Amendment Rights.

The Solicitor General's proposed hearing procedure violates petitioner's right to a public trial, his right to cross-examine and confront the witnesses against him, and his right to the assistance of counsel, as guaranteed by the Sixth Amendment. These Sixth Amendment guaranties apply to suppression hearings to determine whether any of the prosecution's evidence is tainted with illegal electronic surveillance. See *DiBella* v. *United States*, 369 U.S.

121, 131 (1962) (a suppression hearing is part of a criminal trial); *United States* v. *Coplon*, 185 F.2d 629, 636-40 (1950), cert. denied, 342 U.S. 920 (1952). But see Note, *The Coplon Case: Wiretapping, State Secrets, and National Security*, 60 Yale L.J. 736, 738 n.16 (1951). In *Coplon, supra*, the Second Circuit Court of Appeals, speaking through Judge Learned Hand, stated that the trial judge's failure to disclose to the defense all of the records of illegal wiretapping was a violation of their Sixth Amendment rights. 185 F. 2d 637-38. Accord, *People* v. *Cartier*, 51 Cal. 2d 590, 599-600, 335 P.2d 114, 120-21 (1959).

Indeed, in *Coplon, supra*, the court stated that *ex parte, in camera* proceedings would violate the defendant's Sixth Amendment rights *even assuming that the wiretaps were irrelevant to the prosecution's case*:

> "[S]ince we have not seen them [the wiretap records] and do not mean to look at them, we will assume that they justified the judge's finding that they did not 'lead' to any evidence introduced. However, the refusal to allow the defence to see them was, as we have said, a denial of their constitutional right . . . . In the case at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did 'lead,' or might have 'led,' to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor." 185 F.2d at 638.

Petitioner contends that he should have the right to inspect all the records of illegal electronic surveillance.

Coplon, supra; Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized,* 56 Calif. L. Rev. 579, 646 (1968). In addition, petitioner should have the right at a public trial to examine the agents who supervised the illegal activity and the men who overheard the monitored conversations in order to determine the use, dissemination and exploitation of the illegal evidence. See *People* v. *Morhouse,* 21 N.Y.2d 66, 77, 233 N.E.2d 705, 710-11, 286 N.Y.S.2d 657, 665-66 (1967) (where a full evidentiary hearing was directed on remand). It is only in this manner that petitioner can be assured that the prosecution's case is completely scoured of the taint of illegality.

The public proceeding will provide checks upon the veracity of the government's agents as well as assuring that the government has conscientiously turned over to the defense all of the records of illegal surveillance. See *In re Oliver,* 333 U.S. 257, 270 n.25 (1948), citing 1 Cooley, Constitutional Limitations (8th ed. 1927) at 647:

> "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ."

See also 6 Wigmore, Evidence § 1834 (3d ed. 1940).

Through cross-examination of the government's agents who supervised the electronic surveillance, and the people who overheard the monitored conversations, petitioner will be better equipped to ascertain the use to which the illegal activity was put. See *Nardone* v. *United States,* 308 U.S. 338 (1939). No *ex parte, in camera* proceeding can even

come close to doing this. The government's case against the petitioner did not consist of tapes of conversations, or summaries of those conversations. But, conceivably and quite likely the illegal records were exploited in such a way as to lead the government to evidence which was used against the petitioner. See *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963); *Staples* v. *United States,* 320 F.2d 817, 820 (5th Cir. 1963). It is not realistic to assume that a trial judge, no matter how conscientious, would exhaust all possible avenues of inquiry as to the use, dissemination and exploitation of the illegal evidence. *Cf. Dennis* v. *United States,* 384 U.S. 855, 874-75 (1966). Rather, it is only counsel for the defense who has the motive of showing that the government agent's statements are inaccurate or incomplete. Moreover, since the government has the burden of purging its case, *United States* v. *Wade,* 388 U.S. 218, 240 (1967); *United States* v. *Coplon,* 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952), it is difficult to see how the untested and hearsay observations of agents, contained in documents turned over under government supervision, can be said to satisfy that burden.

Related to the right of cross-examination is the right to assistance of counsel. This right includes consultation and understanding of the accused's case before trial, a consideration of his special interest in cross-examination of witnesses, production of defensive evidence, making of argument, and otherwise. *Williams* v. *Beto,* 354 F.2d 698, 705 (5th Cir. 1965). *Ex parte, in camera* proceedings effectively deny petitioner of that right by not providing his counsel with the opportunity of inspecting all of the records and inquiring into their use, dissemination and exploitation. See *United States* v. *Dennis,* 384 U.S. 855, 875

(1966); *Nardone* v. *United States*, 308 U.S. 338, 341 (1939) (once it is established that wiretapping was unlawfully employed, "the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree."); *United States* v. *Coplon*, 185 F.2d 629, 637-39 (1950), cert. denied, 342 U.S. 920 (1952) (refusal to allow defense to see all the wiretaps was a denial of their Sixth Amendment rights).

The suggestion that the hearings to determine whether the petitioner's constitutional rights under the Fourth Amendment were violated be held *in camera* not only violates Sixth Amendment rights of petitioner but is also unprecedented. In *In re Oliver*, 333 U.S. 257, 266 (1948) the Court said: "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."

III.

Ex Parte, in Camera Proceedings Should Not Be Authorized Merely Because This Case May Involve Considerations of National Security.

The Solicitor General has argued that the presence in this case of a national security issue is an additional consideration for requiring an *ex parte, in camera* proceeding. According to the Solicitor General, disclosure of the "inner workings of the investigative process" may "injure the national interest." Memorandum in Response to Motion to Amend the Petition for Certiorari, *Butenko* v. *United States* and *Ivanov* v. *United States*, No. 1007 Misc. and No. 885, October Term, 1967, p. 2.

It would appear that, at this late stage, there is little reason for the Solicitor General's concern with the "inner workings of the investigative process" insofar as the FBI's eavesdropping program is concerned. For example, there have been several statements by former FBI agents to various news media detailing the agency's eavesdropping techniques; also, in *United States* v. *Baker,* 262 F. Supp. 657 (D.D.C. 1966), FBI agents testified extensively of their eavesdropping tactics. *Elson* v. *Bowen,* 436 P.2d 12, 15 (Nev. Sup. Ct. 1967). In addition, other illuminating disclosures have been made by FBI agents as illustrated in Brief for Petitioners on Motion to Modify, *Kolod* v. *United States,* No. 133, October Term, 1967, pp. 8-10.

Jencks v. *United States,* 353 U.S. 657 (1957), effectively disposes of the Government's insistence on an *ex parte, in camera* proceeding if national security is involved:

> "It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession. This has been recognized in decisions of this Court in civil causes where the Court has considered the statutory authority conferred upon the departments of Government to adopt regulations 'not inconsistent with law, for . . . use . . . of the records, papers . . . appertaining' to his department. The Attorney General has adopted regulations pursuant to this authority declaring all Justice Department records confidential and that no disclosure, including disclosure in response to subpoena, may be made without his permission.
>
> "But this Court has noticed, in *United States* v. *Reynolds,* 345 U.S. 1, the holdings of the Court of Appeals for the Second Circuit [*United States* v. *Beek-*

man, 155 F.2d 580 (2d Cir. 1946); *United States* v. *Andolschek,* 142 F.2d 503 (2d Cir. 1944)] that in criminal causes '. . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . .' 345 U.S., at 12.

"In *United States* v. *Andolschek,* 142 F.2d 503, 506, Judge Learned Hand said:

> '. . . While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same

reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively. . . .'

"We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Rovario* v. *United States,* 353 U.S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." 353 U.S. at 670-72.

Accord, *United States* v. *Coplon,* 185 F.2d 629, 636-40 (2d Cir. 1950) (L. Hand, J.), cert. denied, 342 U.S. 920 (1952) (cited with approval in *Dennis* v. *United States,* 384 U.S. 855, 873 n.20 (1966)). See Zagel, *The State Secrets Privilege,* 50 Minn. L. Rev. 875, 903-05 (1966). See also *United States* v. *Egorov,* and *United States* v. *Sokolov* (E.D.N.Y. Oct. 2, 1964), in N.Y. Times, Oct. 3, 1964, p. 1, col. 3; and Oct. 4, 1964, p. 1, col. 5, where, upon the Government's motion, the espionage case against the Sokolovs was dismissed "in the interests of national security." As reported in the N.Y. Times, *supra,* the impression prevailed that in trying to prove the Sokolovs guilty, the United States might disclose investigative and counterespionage techniques. *Cf. Abel* v. *United States,* 362 U.S. 217, 219-20 (1960) (the nature of the case—the fact that it was a

prosecution for espionage—has no bearing whatever upon the legal considerations relevant to the admissibility of evidence); *United States* v. *Powell,* 156 F. Supp. 526 (N.D. Cal. 1957), motion for leave to file petition for writ of mandamus or prohibition denied, 260 F.2d 159 (9th Cir. 1958), mistrial granted, 171 F. Supp. 202 (N.D. Cal. 1959). See generally, Carrow, *Governmental Nondisclosure in Judicial Proceedings,* 107 U. Pa. L. Rev. 166 (1958); Orfield, *Privileges in Federal Criminal Evidence,* 40 U. Det. L.J. 403, 426-31 (1963).

In *Coplon, supra,* the court held that the defendant was entitled to examine unlawfully taken tape-recordings of various telephone conversations although the trial judge had read the records *in camera* and had determined that these recordings had not led the Government to evidence introduced at trial. Judge Learned Hand considered whether the presence in the case of "state secrets"—the divulgence of which would imperil "national security"—would be a sufficient justification for the trial judge's refusal to let defense counsel see the wiretap records which he had read *in camera.* He found that the presence of such "state secrets" was not a sufficient excuse to toll the defendant's constitutional rights under the Sixth Amendment. 185 F.2d at 637-38. Reaffirming his decision in *United States* v. *Andolschek,* 142 F.2d 503 (2d Cir. 1944), he stated:

> "In United States v. Andolschek we held that, when the Government chose to prosecute an individual for crime, it was not free to deny him the right to meet the case made against him by introducing relevant documents, otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the dis-

closure of such 'state secrets' as might be relevant to the defence. To that we adhere." 185 F.2d at 638.

United States v. *Coplon, supra,* and its citation with approval in *Dennis* v. *United States,* 384 U.S. 855, 873 n.20 also effectively disposes of any reliance by the Solicitor General upon the Jencks Act case of *Palermo* v. *United States,* 360 U.S. 343 (1959), and the provisions of Rule 16 of the Federal Rules of Criminal Procedure.

It is to be noted that the material protected under the Jencks Act or by Fed. R. Crim. P. 16(e) from the abuses of discovery (see Advisory Committee's Note, Fed. R. Crim. P. 16(e), 39 F.R.D. 175, 178 (1966)) is material lawfully obtained by the Government. Neither the Jencks Act or 16(e) reach the question here where the material was illegally obtained by electronic surveillance. The claim of the government to the privacy of its files is the strongest possible when such files contain no illegally obtained material. Yet in *Jencks,* the government was compelled to submit to the defense the statements of the witness testifying at the trial despite the claim of state secrets or other confidential information.

If the policy of protecting state secrets from disclosure cannot survive the needs of the defense at trial to obtain merely impeachment material as in *Jencks* when no Fourth Amendment right was at stake, then certainly the need of the defense in the instant case to vindicate a constitutional right is even more compelling to override a claim of privilege because a state secret or confidential information is involved. The same may be said as to any contention that discovery will be abused contrary to the purpose of Fed. R. Crim. P. 16(e). Petitioner does not seek to abuse dis-

covery. He only seeks to vindicate a constitutional right. In any event the government is not prevented from protecting state secrets or confidential information; it has the option, as *Jencks* points out, of dismissing the prosecution.

At this point we may well ask, what is a "state secret" or "national security?" There is "no distinction under the Fourth Amendment between types of crimes. Article III, §3, gives 'treason' a very narrow definition and puts restrictions on its proof. But the Fourth Amendment draws no lines between various substantive offenses." *Katz* v. *United States,* 389 U.S. 347, 360 (1967) (Mr. Justice Douglas' concurring opinion). How, then, is the meaning of these terms to be determined? Certainly not by the government's *ipse dixit* or by a proceeding *in camera. Cf. Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, 228 n.9 (1953) (dissenting opinion).

Moreover, the claim that investigative files containing lawfully-gathered information should be kept free of disclosure

> "could be more sympathetically received if experience showed that the government consistently and carefully separated illegally-gathered material from that legally gathered, to permit easy identification of the source of any given communication or item of intelligence. The evidence demonstrates that, on the contrary, the government mixes up lawful and unlawful in its files, thus by its own conduct reinforcing the need for the kind of inquiry petitioners submit the constitution demands." Brief for Petitioners on Motion to Modify, *Kolod* v. *United States,* No. 133, October Term, 1967, p. 17.

See *United States* v. *Goldstein,* 120 F.2d 485, 488 (2d Cir. 1941) (L. Hand, J.), aff'd, 316 U.S. 114 (1942):

> "[A] wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unraveling the skein which the guilty party has snarled."

Petitioner concedes, however, that there may be instances in which *public* disclosure of records of illegal surveillance would be so inimical to national security that the trial judge should hold a modified *in camera* proceeding *in the presence of the opposing parties, their counsel, and necessary expert witnesses.*[3] See Carrow, *Governmental Nondisclosure in Judicial Proceedings,* 107 U. Pa. L. Rev. 166, 195 (1958); Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements,* 61 Harv. L. Rev. 468, 482-86 (1948); Zagel, *The State Secrets Privilege,* 50 Minn. L. Rev. 875, 886-87 (1966); Note, *Exclusion of the General Public from a Criminal Trial—Some Problem Areas,* 1966 Wash. U.L.Q. 458, 471 n.66; Note, *The Coplon*

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[3] In *Sobell* v. *Unitetd States,* 264 F. Supp. 579 (S.D.N.Y.), aff'd, 378 F.2d 674 (2d Cir. 1967), cert. denied, 389 U.S. 1051, petition for rehearing denied, 390 U.S. 977 (1968), petitioner moved pursuant to 28 U.S.C. §2255 to vacate and set aside a judgment of conviction entered against him in 1951. During the course of the proceedings, the Government, in the interest of national security, submitted an order under which the entire §2255 proceedings would be held *in camera* save those portions the Government might choose to make public. However,

> "when directed to present evidence to prove that the national security would be imperiled by public disclosure, the government, having known all along that its position had no basis in fact and that the AEC had stated the material [relating to the atomic bomb] had been declassified since 1951 and could be publicly disclosed, thereupon abandoned the secrecy melodrama and withdrew its application for *in camera* proceedings . . . ." Petitioner's Brief for Certiorari, *Sobell* v. *United States,* No. 791, October Term, 1967, p. 9.

Case: Wiretapping, State Secrets, and National Security, 60 Yale L.J. 736, 742-43 (1951).

Thus, whenever it becomes evident that the Government has engaged in illegal electronic surveillance: (1) the accused and defense counsel would be entitled to inspect all such records of illegal electronic surveillance; (2) during a public adversary hearing, defense counsel would be permitted to cross-examine government agents as to the use, dissemination and exploitation of the records; (3) despite the general rules (1) and (2) above, the Government upon a sufficient showing at a closed adversary hearing that public disclosure of particular information would jeopardize national security, may obtain from the court a protective order that there be a closed hearing to determine whether the prosecution's case is tainted with illegal evidence. *Cf. Dennis* v. *United States,* 384 U.S. 855, 875 (1966); but see *United States* v. *Youngblood,* 379 F.2d 365, 370 (2d Cir. 1967). At such closed hearing, the adverse parties, their counsel, and expert witnesses would be present. However, if the Government refuses to disclose the records of illegal electronic surveillance at such a hearing, the Court should, as in *Jencks,* dismiss the indictment. See *United States* v. *Cotton Valley Operators Comm.,* 9 F.R.D. 719 (W.D. La. (1949)), aff'd by an equally divided Court, 339 U.S. 940 (1950); Carrow, *Governmental Nondisclosure in Judicial Proceedings,* 107 U. Pa. L. Rev. 166, 195 (1958).

IV.

The Rights of Innocent Third Persons.

In Parts V and VI of this brief, petitioner contends that he should have access to *all* the Government's records of illegal electronic surveillance which form part of the Government's investigative file on him. Thus, petitioner recognizes that inherent in this position is a danger of injury to innocent third persons, and an enlargement of the original breach of their right of privacy. Such a turn-over has been characterized as a compounding of the Government's breach of privacy of third persons. See *United States* v. *Baker,* 262 F. Supp. 657, 666-67 (D.D.C. 1966).

Nevertheless, the further invasion of the rights of third persons is no justification for *ex parte, in camera* inspection of the records of illegal electronic surveillance. Indeed, it seems paradoxical that the Government after invading the rights of these very persons now asserts itself as protector of their interests. To allow the Government to assert the rights of third persons in an attempt to prevent disclosure would permit it to hide behind its own illegal conduct and favor a suitor with unclean hands. *Olmstead* v. *United States,* 277 U.S. 438, 483-85 (1928) (dissenting opinion).

Beyond these admonitions, however, is the delicate balance that must be undertaken between the constitutional right of the accused to purge the prosecution's case of illegal evidence, *Wong Sun* v. *United States,* 371 U.S. 471 (1963); *Weeks* v. *United States,* 232 U.S. 383 (1914), and the government's vicarious claim of the right of third persons to be free from disclosure in a judicial proceeding of material

obtained by the government's invasion of their privacy. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). In unrelated but perhaps analogous situations the Court has struck the balance in favor of protecting the accused's rights to properly present his case. See *Dennis* v. *United States*, 384 U.S. 855 (1966) (secrecy of grand jury minutes); *Jencks* v. *United States*, 353 U.S. 657 (1957) (secrecy of FBI reports), *Rovario* v. *United States*, 353 U.S. 53 (1957) (informer's privilege). Of course, unlike the above cases where the parties knew they were involved, this case relates to the rights of innocent third persons who in no way imagined that they were a part of the Government's surveillance.

As has been analyzed previously in this brief, *ex parte, in camera* inspection by the trial judge will afford no or only *de minimis* protection to the petitioner. Thus, other than by full disclosure of all the records of illegal surveillance, petitioner is deprived of any opportunity to purge the Government's case of illegality. Conversely, although full disclosure of all of the Government's records may further invade the privacy of third persons, it is not at all certain that it would cause injury to them or their reputations; moreover, the courts through the use of protective orders and the contempt power have an available means for adequately protecting the rights of third persons. In comparison then, it would seem that the petitioner's right to protect himself from the government's illegal conduct outweighs the possible invasion of privacy of third persons.

When it is recognized that disclosure of these records has already been made to countless government agents, Memorandum in Opposition to Motion to Modify, *Kolod* v. *United States*, No. 133, October Term, 1967, p. 3, the slight additional disclosure to petitioner does not seem unreason-

able. This appears especially so when compared with the strong policy of affording the defendant every opportunity to vindicate a constitutional right.

If the risk of injury to such persons or to their reputations is serious, then on an adequate showing of this fact, a modified *in camera* hearing as in the case of serious threat to national security, would be appropriate. See pp. 31-32 *supra*.

Interwoven with the problems posed by the intervention of the injury to persons or reputations is the difficult problem of determining when petitioner has standing to object to the use against him of any or all information obtained from illegal surveillance. See *United States* v. *Baker*, 262 F. Supp. 657, 663-67 (D.D.C. 1966). The rest of the brief is devoted to an analysis of this issue.

V.

Standing to Object.

A. Introduction

It would be difficult to invent a more restrictive concept to the vindication of Constitutional rights or leading to greater contrariety of opinion or difficulty of exposition than the doctrine of standing. *Flast* v. *Cohen*, 390 U.S. ——, 88 S. Ct. 1942 (1968); *Berger* v. *New York*, 388 U.S. 41, 101 (1967) (dissenting opinion); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Jones* v. *United States*, 362 U.S. 257 (1960); *United States ex rel. De Forte* v. *Mancusi*, 379 F.2d 897, 899 (2d Cir. 1967), aff'd, 390 U.S. ——, 88 S. Ct. 2120 (1968). See, *e.g.*, Edwards, *Standing to Suppress*

Unreasonably Seized Evidence, 47 Nw. U.L. Rev. 471 (1952); Comment, *Standing to Object to an Unreasonable Search and Seizure,* 34 U. Chi. L. Rev. 342 (1967) [hereinafter cited as Comment, 34 U. Chi. L. Rev. 342 (1967)].

Since *Weeks* v. *United States,* 232 U.S. 383 (1914), this Court has followed the precept that, in order to effectuate the Fourth Amendment's guarantee of freedom from ununreasonable searches and seizures, defendants in federal prosecutions have the right to have excluded from trial evidence which had been obtained by means of an unlawful search and seizure. But it was not until almost fifty years later that this Court held that the Fourth Amendment right to privacy was guaranteed against state invasion by the Fourteenth Amendment, and had to be enforced by the same exclusionary rule applied in the federal courts. *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

And to make more complex the doctrine of standing, this Court has also held that the rights protected by the Fourth Amendment are personal rights which may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure. See, *e.g., Jones* v. *United States,* 362 U.S. 257 (1960).[4] Thus,

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[4] The issue presented to the Court was whether Jones was a "person aggrieved" within the meaning of Rule 41(e) of the Federal Rules of Criminal Procedure, and accordingly had standing to make a motion to suppress pursuant to that Rule:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.' *Hatch* v. *Reardon,*

"although evidence obtained by an unconstitutional search and seizure may not be used at trial against the 'victim' of the search, other persons who do not have 'standing' to object to the search can be convicted on the basis of the same evidence." 34 U. Chi. L. Rev. 342 (1967). See, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *United States* v. *Graham*, 391 F.2d 439 (6th Cir. 1968); *United States* v. *Bozza*, 365 F.2d 206 (2d Cir. 1966). *Cf. Goldstein* v. *United States*, 316 U.S. 114 (1942).

In the pre-*Mapp* era, the federal rule was that a defendant who wished to assert a Fourth Amendment right was required to "claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Jones* v. *United States*, 362 U.S. 257, 261 (1960); see, *e.g.*, *Simmons* v. *United States*, 390 U.S. 377, 389-90 (1968); Edwards, *supra*. Strict adherence to such a rule could create injustice. In part to avoid the particular dilemma in *Jones*, this Court in that case relaxed the above standing requirements in two alternative ways: (1) when as in *Jones*, possession of the seized evidence both convicts and confers standing, there is no necessity for a preliminary showing of an interest in the

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204 U.S. 152, 160. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.

"Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." 362 U.S. at 261.

premises searched or the property seized; (2) alternatively, the defendant need not have a possessory interest in the searched premises in order to have standing; suffice, that he be legitimately on the premises where the search occurs.[5]

In cases subsequent to *Jones*, this Court has further relaxed standing requirements in order to effectuate the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures.

Although in *Berger* v. *New York*, 388 U.S. 41 (1967) the petitioner was found clearly to have "standing to challenge the statute being undisputably affected by it," Mr. Justice Harlan in his dissent at pp. 101-04 analyzed the threshold issue of standing in the following way. Berger's conversations were overheard by an electronic device in the office of Harry Steinman, apparently as part of the investigation of Steinman. The installation of the device was under the authority of New York's permissive eavesdrop statute, N.Y. Code Crim. Proc. §813-a;[6] this order was issued on

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[5] Some relaxation of the stringent standard seemed to be in the making even prior to *Jones*. *United States ex rel. De Forte* v. *Mancusi*, 379 F.2d 897 (2d Cir. 1967), aff'd, 390 U.S. ——, 88 S. Ct. 2120 (1968). In *McDonald* v. *United States*, 335 U.S. 451 (1948), the Court held that where the trial court wrongfully denied a defendant's motion to suppress, the denial was error that was prejudicial to a codefendant as well, even assuming that the codefendant's right of privacy was not invaded. See the recent case of *Roberts* v. *United States*, 389 U.S. 18 (1967). But see *Wong Sun* v. *United States*, 371 U.S. 471 (1963). And in *United States* v. *Jeffers*, 342 U.S. 48 (1951), the Court held that a defendant who had stored narcotics in a hotel room rented by his two aunts, and to which he had been given the key, had standing to object to an unlawful search and seizure in the aunt's room.

[6] The Court held that the language of §813-a was too broad in its sweep, permitting a trespassory invasion of the home or office, by general warrant, contrary to the Fourth and Fourteenth Amendments.

the basis of affidavits which "indicated that evidence had been obtained 'over a duly authorized eavesdropping device installed in the office of the aforesaid Harry Neyer,' that conferences relative to the payment of unlawful fees' occurred in Steinman's office." 388 U.S. at 96. Thus the Steinman order was issued principally upon the basis of evidence obtained under the authority of the Neyer order. A threshold question, therefore, was whether Berger had standing to contest the Neyer order to determine whether it was issued upon probable cause.

It appeared that Berger was never present in Neyer's office during the period in which eavesdropping was conducted; nor did Berger have a proprietary interest in the premises. The only invasion of Berger's privacy was that in the course of the surveillance of Neyer's office, Neyer had several telephone calls with Berger. To Mr. Justice Harlan, this slight invasion of Berger's privacy was sufficient to confer standing upon him:

> "The central question should properly be whether his privacy has been violated by the search; it is enough for this purpose that he participated in a discussion into which the recording intruded. . . . [T]he recording of a portion of a telephone conversation to which petitioner was party would suffice to give him standing to challenge the validity under the Constitution of the Neyer order." 388 U.S. at 103-04.

Further erosion of the doctrine of standing is found in *Mancusi* v. *De Forte,* 390 U.S. ——, 88 S. Ct. 2120 (1968) where union records were seized from an office shared by De Forte and several other union officials. At the time of the seizure De Forte was present in the office, and pro-

tested the seizure. The papers which were seized, however, belonged not to De Forte but to the Union. Nevertheless, the Court held that De Forte had standing to object to the admission of the papers at his trial. The case appears to be a significant relaxation of traditional standing requirements; heretofore the Court has held that a defendant has no standing to object to the use of papers and documents against him at his trial on the ground that those records, belonging to someone else, had been taken from the owner in violation of the owner's Fourth Amendment rights; rather objection to use of such papers as evidence has been left to the owner whose own constitutional rights were invaded. 88 S. Ct. at 2126-28 (dissenting opinion). It is clear, however that the Court did not overrule the requirement of standing; rather the Court justified its decision on a liberal interpretation of *Jones; supra,* and *Katz* v. *United States,* 389 U.S. 347 (1967). As stated by the Court in *Mancusi:*

> "Moreover, this is not a case in which it is necessary to decide whether the traditional doctrine that Fourth Amendment rights 'are personal rights, and . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure' . . . should be modified." 88 S. Ct. at 2122-23.[7]

The question remains, however, whether there is any life or vitality left to the doctrine of standing. In *Simmons* v. *United States,* 390 U.S. 377, 390 n.12 (1968), it was noted

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[7] For other recent cases discussing the issue of standing, see *Bumper* v. *North Carolina,* 390 U.S. ——, 88 S. Ct. 1788 (1968); *Simmons* v. *United States,* 390 U.S. 377 (1968); *cf. Roberts* v. *United States,* 389 U.S. 18 (1967).

that it has been suggested that the adoption of a "police-deterrent" rationale for the exclusionary rule logically dictates the abolition of the doctrine of standing. The Court, however, did not consider this position because that argument was not advanced in *Simmons*. Petitioner advances that argument in this case but before doing so will analyze his rights on the basis of the doctrine of standing as though it were still viable and will hereinafter contend that the doctrine of standing is an anomaly and an anachronism which if not already interred, should be now.

B. Petitioner Has Standing to Object to Illegal Surveillance Conducted at His Premises.[8]

If illegal surveillance took place at the premises of petitioner while he was present on the premises, there is no question that petitioner would have standing to object to the use against him of that evidence. *Jones* v. *United States,* 362 U.S. 257 (1960). Truly in this situation, petitioner would be the "one against whom the search was directed." *Id.* at 261. See *Mancusi* v. *De Forte,* 390 U.S. ——, 88 S. Ct. 2120, 2123 n.4 (1968); *Bumper* v. *North Carolina,* 390 U.S. ——, 88 S. Ct. 1788, 1791 n.11 (1968); *Fullbright* v. *United States,* 392 F.2d 432 (10th Cir. 1968).

Likewise, if petitioner was absent from his premises while illegal surveillance was being conducted there, and was also not a party to the overheard conversation, he would also have standing to object to the use against him of the evidence thereby obtained. *Mancusi* v. *De Forte,* 390 U.S. ——, 88 S. Ct. 2120, 2123 n.4 (1968); *Bumper* v. *North*

[8] This contention is apparently conceded by the Solicitor General. See Memorandum for the United States on Motion to Amend, *Kolod* v. *United States,* No. 133, October Term, 1967, pp. 5-6.

Carolina, 390 U.S. ——, 88 S. Ct. 1788, 1791 n.11 (1968); *Jones* v. *United States,* 362 U.S. 257 (1960); *United States* v. *Jeffers,* 342 U.S. 48 (1951); *Henzel* v. *United States,* 296 F.2d 650 (5th Cir. 1961); *United States* v. *Baker,* 262 F. Supp. 657, 665-66 (D.D.C. 1966). *Jones, supra,* states the traditional view that a substantial possessory interest in the premises searched is, by itself, sufficient to confer standing. 362 U.S. at 261, 263.[9] "His possessory interest derives *where* the search is made, not *when.*" *Dean* v. *Fogliani,* 407 P.2d 580, 582 (Nev. Sup. Ct. 1965). Indeed, whether or not the petitioner happens to be present at his premises during the illegal surveillance, he is still the "one against whom the search was directed." *Bumper* v. *North Carolina,* 390 U.S. ——, 88 S. Ct. 1788, 1791 n.11 (1968); *Henzel* v. *United States,* 296 F.2d 650, 653 (5th Cir. 1961). Moreover, one has the reasonable expectation that his premises will be secure against governmental intrusion regardless of whether he is present in the premises at the particular time that the surveillance is conducted. See *Mancusi* v. *De Forte,* 390 U.S. ——, 88 S. Ct. 2120, 2123-24 (1968); *Katz* v. *United States,* 389 U.S. 347 (1967). The "reasonable expectation" test for determining whether there has been an invasion of privacy used by this Court in *Mancusi* v. *De Forte, supra,* has been incorporated in the Crime Control Act §2510(2) by defining "oral communication" to mean "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."

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[9] In *Jones,* standing was held to exist on two distinct grounds, one of which was a sufficient possessory interest in the premises searched. *Mancusi* v. *De Forte,* 390 U.S. ——, 88 S. Ct. 2120, 2123 n.5 (1968).

But even under the orthodox standards, this expectation, to be let alone, is defeated by illegal electronic surveillance of petitioner's premises, whether or not he was present on the premises or party to the overheard conversation. Hence, if petitioner has a possessory interest in the premises searched, it is not necessary that he be a party to the overheard conversations, or otherwise have a possessory interest in the property seized. In *Mancusi* v. *De Forte,* 390 U.S. ——, 88 S. Ct. 2120 (1958), De Forte did not even have a possessory interest in the premises although he was legitimately on the premises where the search occurred. The property seized, however, belonged not to De Forte but to the Union. Nevertheless, he was held to have standing. See, *e.g., Giacona* v. *United States,* 257 F.2d 450 (5th Cir.), cert. denied, 358 U.S. 873 (1958); *United States* v. *Baker,* 262 F. Supp. 657, 665-66 (D.D.C. 1966); Annot., 78 A.L.R. 246, 253 (1961).

C. Petitioner Has Standing to Object to Illegal Surveillance Conducted at the Premises of His Codefendant (or at the Premises of the Unindicted Co-Conspirators).

If illegal surveillance took place at the premises of petitioner's codefendant or the unindicted co-conspirators while petitioner was present on their premises, it seems clear that petitioner would have standing to object to the use against him of any or all information obtained by the surveillance. *Jones* v. *United States,* 362 U.S. 257 (1960). At the time of the search, Jones was present on the searched premises with the permission of the owner. The Court held that "anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." *Id.* at 267.

Similarly, in *United States* v. *Hagarty,* 388 F.2d 713 (7th Cir. 1968), electronic surveillance was conducted as part of the investigation of one Nasser at his office. During part of the surveillance, Hagarty was present in Nasser's office at Nasser's invitation; during that time, recordings of their conversations were made. The court held that Hagarty had standing to object to the recordings even though they were made as part of the investigation of Nasser and took place in his office. The court relied principally on this Court's decision in *Berger* v. *New York,* 388 U.S. 41 (1967). There Berger's conversation was overheard by an electronic device in the office of Steinman, apparently as part of the investigation of Steinman. The Court stated: ". . . petitioner clearly has standing to challenge the statute [permitting judicially approved eavesdropping], being indisputably affected by it . . . ." *Id.* at 55. See *Katz* v. *United States,* 389 U.S. 347 (1967) (capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded premises, but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion); *United States* v. *Jeffers,* 342 U.S. 48 (1951); *United States* v. *Baker,* 262 F. Supp. 657 (1966).

Likewise, if recordings were made at the codefendant's or an unindicted co-conspirator's premises of conversations to which petitioner was not a party, even though he was present on the codefendant's or the unindicted co-conspirator's premises at the time of the surveillance, he would still have standing to object to the recordings made. *Berger* v. *New York,* 388 U.S. 41, 103 (1967) (dissenting opinion) (without significance if Berger had been present for a conference in Neyer's office, but had said

nothing). See *Mancusi* v. *De Forte*, 390 U.S. ——, 88 S. Ct. 2120 (1968) (unnecessary to have an interest in the property seized).

Where the petitioner is not present on the premises of the codefendant or an unindicted co-conspirator while illegal surveillance is being conducted there, but the petitioner's conversation is recorded (for example, by overhearing a telephone conversation) petitioner would also have standing to challenge the admissibility of the evidence obtained thereby. *Berger* v. *New York*, 388 U.S. 41, 101-04 (1967) (dissenting opinion). Such a result would not be contrary to the traditional doctrine that Fourth Amendment rights "are personal rights, and . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons* v. *United States*, 390 U.S. 377, 389 (1968). In *Berger*, Mr. Justice Harlan stated:

> "It is surely without significance in these circumstances that petitioner did not conduct the conversation from a position physically within the room in which the device was placed; the fortuitousness of his location can matter no more than if he had been present for a conference in Neyer's office, but had not spoken, or had been seated beyond the limits of the device's hearing. The central question should properly be whether his privacy has been violated by the search; it is enough for this purpose that he participated in a discussion into which the recording intruded. Standing should not, in any event, be made an insuperable barrier which necessarily deprives of an adequate remedy those whose rights have been abridged; to impose distinctions of excessive refinement upon the doctrine

> 'would not comport with our justly proud claim of the procedural protections accorded to those charged with crime.' *Jones* v. *United States, supra,* at 267. It would instead 'permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right.' *United States* v. *Jeffers,* 342 U.S. 48, 52. I would conclude that, under the circumstances here, the recording of a portion of a telephone conversation to which petitioner was party would suffice to give him standing to challenge the validity under the Constitution of the Neyer order." 388 U.S. at 103-04 (dissenting opinion).

See *United States* v. *Hagarty,* 388 F.2d 713 (7th Cir. 1968); *United States* v. *Baker,* 262 F. Supp. 657, 663-66 (D.D.C. 1966) (defendant given all recordings of conversations in which he was a participant).[10]

Where the petitioner is neither present at the premises of the codefendant or the unindicted co-conspirators nor a party to overheard conversations, it is submitted that he should also have standing to object to information obtained by the surveillance at such premises. At first blush, it appears that to sustain this position, the Court would have to modify the traditional notion that Fourth Amendment rights "are personal rights" that "may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed." *Mancusi* v. *De Forte,* 390 U.S. ——, 88 S. Ct. 2120, 2122-23 (1968). However, certain opinions of this Court and other courts offer the Court a basis

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[10] The contention here urged is apparently conceded by the Solicitor General. See Memorandum for the United States on Motion to Amend, *Kolod* v. *United States,* No. 133, October Term, 1967, pp. 5-6.

for sustaining petitioner's contention without modification of traditional doctrine.

McDonald v. *United States*, 335 U.S. 451 (1948) supports the position that if any defendant is entitled to suppression, erroneous denial of a motion on his behalf is prejudicial to his codefendants. In *McDonald*, police officers entered McDonald's rooming house without a warrant and found him and a guest, Washington, in possession of numbers, slips, piles of money, and adding machines. This evidence was used to convict McDonald and Washington of running a lottery. After holding that denial of McDonald's motion to suppress was erroneous, the Court, in an opinion by Mr. Justice Douglas, and joined in by three other Justices stated:

> "[T]he unlawfully seized evidence was used not only against McDonald but against Washington as well, the two being tried jointly. Apart from this evidence there seems to have been little or none against Washington. Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that *the denial of McDonald's motion was error that was prejudicial to Washington as well*. . . . If the property had been returned to McDonald, it would not have been available for use at the trial." 335 U.S. at 456. (Emphasis added.)[11]

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[11] In a concurring opinion, Mr. Justice Rutledge was of the opinion that with respect to Washington, the evidence, having been illegally obtained was inadmissible. 335 U.S. at 456-57.

> "It is not clear from the Court's opinion in *McDonald* why it was *error* to admit the evidence against Washington (there being no doubt that the admission was prejudicial). One an-

McDonald has been accepted for the "principle that the erroneous denial of a pretrial motion to suppress is prejudicial not only to the defendant who made the motion but to his codefendant as well if the illegally seized material is the basis of evidence used against the latter at trial." *United States* v. *Graham*, 391 F.2d 439, 445 (6th Cir. 1968); *Rosencranz* v. *United States*, 334 F.2d 738, 739 (1st Cir. 1964). Moreover, as the case has been interpreted, the rights conferred upon those who would otherwise be in no position to object to the introduction of the illegal evidence are derivative or secondary in the sense that they depend upon a timely objection by the party with standing, *United States* v. *Graham*, 391 F.2d 439, 445 (6th Cir. 1968).[12]

We find in *Hoffa* v. *United States*, 385 U.S. 293 (1966), reh. denied, 386 U.S. 940 (1967) support for *McDonald*. In that case Partin, an undercover agent had conversations with Hoffa and King but never with Parks and Campbell the other two conspirators; the reports on Hoffa and

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swer suggested by the Court in its statement that had the property 'been returned to McDonald, it would not have been available at the trial,' has generally been discounted in subsequent decisions. See Rosencranz v. United States, supra, 334 F.2d at 740-741, n.3; United States v. Granello, supra, 243 F. Supp. at 327-328." *United States* v. *Graham*, 391 F.2d 439, 445 (6th Cir. 1968).

[12] Several Circuit Courts of Appeals have followed the ruling in *McDonald*. See, e.g., *Wattenburg* v. *United States*, 388 F.2d 853, 859 (9th Cir. 1968); *Barnett* v. *United States*, 384 F.2d 848, 862 (5th Cir. 1967); *Gillespie* v. *United States*, 368 F.2d 1, 6-7 (8th Cir. 1966); *Rosencranz* v. *United States*, 334 F.2d 738 (1st Cir. 1964); *Hair* v. *United States*, 289 F.2d 894, 897 (D.C. Cir. 1961). *Contra*, *United States* v. *Graham*, 391 F.2d 439 (6th Cir. 1968); *United States* v. *Bozza*, 365 F.2d 206 (2d Cir. 1966). It has been suggested that the decision of this Court in *Wong Sun* v. *United States*, 371 U.S. 471 (1963) overruled *McDonald*. Comment 34 U. Chi. L. Rev. 342, 346 n.26 (1967).

King "uncovered leads that made possible the development of evidence against petitioners Parks and Campbell." 385 U.S. at 300. The government contended that Parks and Campbell had no standing because Partin never communicated with them. Their rights were held to depend on Hoffa who clearly had standing to invoke his constitutional right and that they could not prevail unless Hoffa prevailed. It is clear from *Hoffa* that the sanction for the invasion of a Constitutional right extends to others charged in the same conspiracy as well as to the initial or sole victim of the invasion. It is appropriate that a codefendant should be given at least derivative or representative standing when the charge against him is a conspiracy, as in the instant case, in view of the rule of attribution normally applied in conspiracy cases.

It seems that the holding of *McDonald* and *Hoffa* applies to the present case. As analyzed, *supra,* a codefendant has standing to challenge information illegally obtained during a surveillance of his premises or conversations of a co-conspirator. If he had been erroneously denied a motion to suppress, that denial would have been prejudicial error as to petitioner as well under *McDonald* and *Hoffa,* since during their joint trial, the evidence would have been used against both the codefendant and the petitioner. But where the codefendant does not have an opportunity to object to illegally-gathered evidence until after the conclusion of the joint trial (because of the tardy admission of illegal surveillance activity by the Government), the same result of prejudicial error to petitioner should apply. *Cf. Roberts* v. *United States,* 389 U.S. 18 (1967). It would be inconsistent with the fair administration of criminal justice to let the rights of petitioner rest upon the fortuitous disclosure by

the Government of its illegal conduct prior to the joint trial. For if petitioner is prejudiced only if his codefendant is erroneously denied a pretrial motion to suppress, there would be an incentive on the part of the Government to withhold disclosure until after trial, in order to circumvent the rule in *McDonald.*[13]

Judge Aldrich's concurring opinion in *Rosencranz* v. *United States,* 334 F.2d 738, 741-42 (1st Cir. 1964) presents an alternative basis upon which to grant petitioner standing to object to illegal electronic surveillance at the premises of a codefendant or an unindicted co-conspirator.[14] As stated by Judge Aldrich:

> "[T]he real basis of the exclusionary rule is its effect as a police deterrent, and that the rule should be fashioned to deter the accomplishment of whatever purpose the police were improperly attempting to further. I believe, accordingly, that the present defendants' rights are not simply dependent upon Amorello's [a codefendant], as Washington's were said to depend upon McDonald, but are broader, and stem from their own status as parties against whom the search was directed. Surely, in stopping Amorello's truck, the

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[13] If the codefendant had successfully moved prior to trial to suppress the evidence that evidence could not be introduced at the joint trial of the codefendant and petitioner, even though there was a clear instruction that the evidence could be considered only as against petitioner. *Gillespie* v. *United States,* 368 F.2d 1, 6 (8th Cir. 1966); *cf. Bruton* v. *United States,* 390 U.S. ——, 88 S. Ct. 1620 (1968).

[14] In *Rosencranz,* Amorello and his codefendants were indicted for offenses relating to the operation of an illicit still. Before trial Amorello moved to suppress as evidence materials seized from the truck he owned and operated. After his motion was denied he pleaded guilty and the seized evidence was introduced at the trial of Amorello's codefendants over their objections.

interests of the police were not limited to the driver, *but were directed against all those, whether their identities were known or not, who might be engaged in the operation of the still.* I find support for this in Jones v. United States, supra, where the court said, 362 U.S. at 261, 80 S. Ct. at 731,

> 'In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, *one against whom the search was directed,* as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.'" *Id.* at 742. (Emphasis added.)

This theory of standing would have an appropriate application in the area of illegal electronic surveillance and finds support in the most recent congressional legislation on the subject. In the Crime Control Act §2510(11), the term "aggrieved person" is defined to mean "a person who was a party to any intercepted wire or oral communication or *a person against whom the interception was directed*" (emphasis added). Under this statutory standard interceptions of a codefendant's or an unindicted co-conspirator's oral communications would constitute petitioner an "aggrieved person" if the surveillance was directed against him. And in view of the fact that the indictment and convictions are based on charges of conspiracy, it is difficult to conceive a surveillance of a codefendant's or an unindicted co-conspirator's premises as not being directed at petitioner. Petitioner also respectfully submits that this Court should apply the aforesaid statutory definition of an "aggrieved person" to him in the instant case as this

Court applied the statutory standards of the Jencks Act in *Palermo.*

The surreptitious and extensive nature of electronic surveillance requires an application of the doctrine of standing co-extensive with the type of illegal activity involved. Even more than in a search for tangible items electronic surveillance is directed not only at the owner of the searched premises, but also at the person's compatriots in crime, whether their identities are known or not. *Cf.* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized,* 56 Calif. L. Rev. 579, 645 (1968) [hereinafter cited as Pitler]. Many electronic surveillances are "intelligence type investigations" where no particular violation of federal law is being pursued. For example, during the electronic surveillance of Mr. Drew in *United States* v. *Drew,* Cr. No. 1333, United States District Court for the District of Nevada, FBI agents "were interested in Mr. Drew from the standpoint of his activities, his associates, who he was contacting in connection with organized crime and organized criminal activity;" the "primary objective in the investigation was intelligence information just as it is in an espionage investigation." Brief for Petitioners on Motion to Modify, *Kolod* v. *United States,* No. 133, October Term, 1967, p. 8. Thus to grant these associates and codefendants standing would be commensurate with the purpose of the exclusionary rule, and in line with the Court's holding in *Jones, McDonald,* and *Hoffa.*

Petitioner, however, recognizes the criticisms of *McDonald* and Judge Alrich's opinion.[15] Moreover, the approach

[15] For example, *McDonald* never expressly modified the traditional doctrine that Fourth Amendment rights are personal rights which may be enforced by only the person whose own privacy was invaded. Judge Alrich's opinion presents the difficult problem of

suggested by the two opinions does not suffice to give petitioner the full measure of protection which is necessary to assure that the prosecution's case is not tainted with illegally-gathered evidence. In addition to the records of surveillance at his own or a codefendant's or co-conspirator's premises, petitioner contends that he should have access to *all* the Government's records of illegal electronic surveillance which form part of the Government's investigative file on petitioner and the crime for which he was convicted; this turnover would include all records of surveillance at the premises of innocent third persons not a party to the criminal action. Leads to evidence against petitioner may have been obtained just as readily from such third persons, as from petitioner's codefendant or unindicted co-conspirators. Thus, petitioner will be assured that the prosecution's case is scoured of illegally-gathered evidence only by the full turnover suggested.[16]

Petitioner concedes that there is no method of achieving this result other than by modifying or abolishing the traditional doctrine of the personal nature of Fourth Amendment rights. See *Mancusi* v. *De Forte*, 390 U.S. ——, 88 S. Ct. 2122-23 (1968). It is to this necessary modification or abolition that petitioner now turns.

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determining in each case whether the government officials directed their surveillance at persons other than the owner of the searched premises. Moreover, Judge Alrich's approach avoids a confrontation with the traditional dogma.

[16] The further breach of the right of privacy of third persons has been discussed in Point IV, *supra*.

VI.

Petitioner Should Have Standing to Object to the Use Against Him of Any Illegally-Gathered Evidence, Regardless of Its Source.

"Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry* v. *Ohio,* 390 U.S. ——, 88 S. Ct. 1868, 1875 (1968); see *Weeks* v. *United States,* 232 U.S. 383, 391-93 (1914). The exclusionary rule is therefore designed "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Mapp* v. *Ohio,* 367 U.S. 643, 656 (1961). See *Terry* v. *Ohio, supra; Linkletter* v. *Walker,* 381 U.S. 618 (1965). See generally Comment, 34 U. Chi. L. Rev. 342 (1967).

> "The rule also serves another vital function—'the imperative of judicial integrity.' Elkins v. United States, 364 U.S. 206, 222 . . . (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of

the exclusionary rule withholds the constitutional imprimature." *Terry* v. *Ohio, supra,* 88 S. Ct. at 1875.

See *Mapp* v. *Ohio, supra* at 659; *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (dissenting opinion).

To give proper effect to the exclusionary rule, it seems logical to exclude all illegally obtained information, regardless of its source, unless there are competing considerations which compel a more restricted application of the rule. See Amsterdam, *Search, Seizure and Section 2255: A Comment,* 112 U. Pa. L. Rev. 379, 389 (1964); Pitler, *supra* at 586-88. One competing consideration, in criminal as well as civil cases, is the judicial policy of admitting relevant and reliable evidence in order to maximize the search for the truth; in criminal prosecutions, the exclusionary rule conflicts with an additional policy—the strong public interest in convicting the guilty. *Id.*[17] These competing policies "create a shield to repel the exclusionary rule's radiations," and "may well explain the continued vitality, if not the origin of, the standing requirement . . . ." Pitler, *supra* at 587. As discussed by Professors Amsterdam and Pitler, *supra,* the exclusionary rule's deterrent effect "is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest . . . ." Thus, in every prosecution in which exclusion is in issue, the strong public interest in deterring lawless police conduct must be balanced against

[17] Another obvious competing consideration is the rights of innocent third persons. See point IV *supra.*

the public interest in convicting the guilty, and the judicial policy of admitting trustworthy evidence. Pitler, *supra* at 587.

Decisions of the Courts of Appeals for the Sixth and Second Circuits have struck the balance in favor of the latter policies, stating that the policy of deterrence is sufficiently advanced by excluding the results of illegal searches and seizures at the behest of victims. See *United States* v. *Graham*, 391 F.2d 439, 445-46 (6th Cir. 1968); *United States* v. *Bozza*, 365 F.2d 206, 223 (2d Cir. 1966).[18] The above proposition appears to present the crucial issue to which this Court must address itself, namely, are the purposes of the exclusionary rule sufficiently advanced by excluding the results of illegal electronic surveillance at the behest of only the victims of the surveillance?[19] In other

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[18] The fact that deterrence is achieved at a high price—the suppression of relevant evidence—has led some commentators to conclude that the exclusionary rule should not be available to defendants who claim no interest in the property searched or seized. See, *e.g.*, Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471, 472 (1952); Comment, *Standing to Suppress Evidence Obtained by Unconstitutional Search and Seizure*, 55 Mich. L. Rev. 567, 581 (1957).

[19] *Jones* v. *United States*, 362 U.S. 257, 261 (1960) states that the exclusionary rule is a "means for making effective the protection of privacy" of the victim of the illegal search. "But it is difficult to see how the exclusionary rule accomplishes this objective. An unreasonable search can never be undone. At the time of exclusion, the victim's home has already been entered and his secrets have been uncovered. [*Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965).] The only protection the exclusionary rule can give this type of privacy rests in the possibility that the police will be deterred from making a second search of the victim's premises." Comment, 34 U. Chi. L. Rev. 342, 347 (1967). Accord, Pitler, *supra* at 649 n.352. *Jones* can be explained if one recognizes that the exclusionary rule was originally premised on both the Fourth and Fifth Amendments; thus, its protection was thought by most courts and commentators to be limited to the victim of the search. See Broeder, *Wong Sun* v. *United States: A Study in Faith and*

words, will the admission against defendants of evidence obtained by illegal electronic surveillance at the premises of a codefendant, an unindicted co-conspirator, or a third person not a party to or involved in the criminal action encourage unlawful police conduct in the future?

The illogic of the present standing requirement is that it serves to defeat the purpose for which the exclusionary rule exists, and encourages rather than discourages unlawful police conduct. See Comment, 115 U. Pa. L. Rev. 1136, 1141 (1967). As observed by one commentator:

> "Unlike many deterrent mechanisms, the exclusionary rule does not achieve its effect by the infliction of sanctions, but rather by the removal of incentives. The rule encourages police to refrain from unreasonable searches not for fear of punishment, but simply because there is no reason for making them. When the courts [through the imposition of standing requirements] allow some violations of the fourth amendment to reap rewards, the removal of incentives, which is the only basis of the deterrence, is undermined." Comment, 34 U. Chi. L. Rev. 342, 357 (1967).

Hope, 42 Neb. L. Rev. 483, 540 (1963); Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. Pa. L. Rev. 1136, 1140-41 (1967) [hereinafter cited as Comment, 115 U. Pa. L. Rev. 1136 (1967)]. Therefore, according to Professor Broeder, the "personal interest" or "aggrieved party" limitation "is based on an historical misunderstanding" of the Fourth Amendment. Broeder, *supra*.

> "[T]here is absolutely no reason . . . why a rule designed to protect fourth amendment rights should depend on more than the fourth amendment and/or why the self-incrimination clause of the fifth amendment, which by definition can only be personal, should be employed to water down the scope of the fourth by engrafting upon it a 'personal interest' or 'aggrieved party' limitation." Broeder, *supra*.

Thus, once government officials are certain that only the victim of the search can challenge the admissibility of illegally seized evidence, they will be free, if so inclined, "to invade homes, wiretap phones, and 'bug' bedrooms as long as the information is not used against the owner, or one who is legitimately on the premises or a party to the conversation." Pitler, *supra* at 649. See *People* v. *Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955);[20] Broeder, *Wong Sun* v. *United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 539 (1963); Comment, 115 U. Pa. L. Rev. 1136, 1141 (1967); 66 Colum. L. Rev. 400, 404 (1966).[21] Indeed, the rise in the number of lower court opinions in recent years wherein defendants have unsuccessfully sought to suppress evidence illegally seized from third persons may suggest

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[20] In *People* v. *Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955), the Supreme Court of California refused to follow the federal rule that only those whose own constitutional rights have been violated may object to the introduction against them of illegally obtained evidence. Justice Traynor, speaking for the court, stated that courts "have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers . . . whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence." *Id.* at 759, 290 P.2d at 857. In addition, "if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of evidence illegally obtained against them." *Id.*

[21] *Cf. People* v. *Portelli*, 15 N.Y.S.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965), cert. denied, 382 U.S. 1009 (1966) (witness beaten and tortured until he gave information concerning defendant); National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 156 (1931) ("third degree" employed to get information about an offense from persons who are not suspected of committing a crime but only knowing about it).

that the present standing requirements have served to encourage illicit police behavior. See, *e.g., Thomas* v. *United States,* 394 F.2d 247 (10th Cir. 1968); *United States* v. *Graham,* 391 F.2d 439 (6th Cir. 1968) (and cases cited *id.* at 444); *United States* v. *Baker,* 262 F. Supp. 657 (D.D.C. 1966); *People* v. *Cefaro,* 21 N.Y.2d 252, 234 N.E.2d 423, 287 N.Y.S.2d 371 (1967).[22]

Thus it seems that the purpose of the exclusionary rule —to deter illicit police activity—is not sufficiently advanced by excluding the results of illegal electronic surveillance at the behest of only the victims of the surveillance.

Aside from deterrence, however, the exclusionary rule also serves another vital function—the preservation of judicial integrity. *Terry* v. *Ohio,* 390 U.S. ——, 88 S. Ct. 1868, 1875 (1968). "Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Id.* However a ruling which permits the admission against petitioner of evidence seized in flagrant violation

[22] In addition to encouraging illicit police conduct, the application of the standing requirement often achieves unjust and undesirable results. This is perhaps best illustrated by the conspiracy cases where the owner of the illegally searched premises, who is often the ringleader, goes free while his underlings are incarcerated. Broeder, *supra* at 541; Comment, 34 U. Chi. L. Rev. 342 (1967); Comment, 115 U. Pa. L. Rev. 1136, 1141 (1967). See cases cited in *United States* v. *Graham,* 391 F.2d 439, 444 (6th Cir. 1968). "This result can be explained only as a compromise, through which the leader must go free in the interest of deterring unlawful police conduct. At the same time, society continues to prefer to incarcerate the underlings rather than, for the sake of consistency, free all the conspirators without punishment." Comment, 115 U. Pa. L. Rev. 1136, 1141 (1967).

of a third person's Fourth Amendment rights "has the necessary effect of legitimizing the conduct which produced the evidence." *Id.*; accord, *People* v. *Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955). See Broeder, *supra* at 540: "[T]he Court, in allowing a conviction based on a fourth amendment violation to stand, sullies its own distinguished image and casts an ominous, brooding shadow over the administration of criminal justice throughout the land."[23] Thus the preservation of judicial integrity is an additional reason for modifying the traditional doctrine that Fourth Amendment rights are personal rights which may be enforced only at the behest of the victim of the illegality.

The standing requirement, therefore, is at odds with both purposes of the exclusionary rule.[24] This rule has been most recently interpreted as a general deterrent—the pro-

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[23] "Moreover, the exclusionary rule has an educational function. It is intended to instill in police officers an appreciation of the importance of individual privacy, and in citizens a sense of respect for the integrity of the law enforcement system and, consequently, for the laws of the society. When selective violations of the Constitution are sanctioned by the courts, this mutual respect can only break down." 34 U. Chi. L. Rev. 342, 357 (1967).

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[24] "Standing reflects whether the defendant has been affected in a manner that is within the scope of the fourth amendment's protection . . . . Because of the intimate relationship between standing and the constitutional guarantee, it is necessary that standing be consistent with the desired goals of the exclusionary rule, the expressed means for enforcing that guarantee." Note, 1965 Wash. U.L.Q. 488, 518-19.

tection of society as a whole from illegal police conduct,[25] see *Terry* v. *Ohio*, 390 U.S. ——, 88 S. Ct. 1868, 1875 (1968); *Linkletter* v. *Walker*, 381 U.S. 618 (1965); Comment, 34 U. Chi. L. Rev. 342 (1967), as well as a device for maintaining judicial integrity. *Terry* v. *Ohio, supra.* To achieve these purposes of the exclusionary rule, the entire concept of standing as a prerequisite to allege a Fourth Amendment violation must be modified. This was done by the Supreme Court of California in *People* v. *Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955). There, Justice Traynor reasoned that *any* use of illegally obtained evidence would (1) undermine the deterrent effect of the exclusionary rule[26] and (2) place the courts in a position of condoning illegal police practices. Thus he concluded:

> "Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible *whether or not it was obtained in violation of the particular defendant's constitutional rights.*" *Id.* at 761, 290 P.2d at 857. (Emphasis added.)

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[25] See the remarks of Justice Jackson in *Brinegar* v. *United States*, 338 U.S. 160, 180-81 (1949) (dissenting opinion):

> "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror into every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."

[26] California adopted the exclusionary rule shortly before the *Martin* case. *People* v. *Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

The *Martin* rule[27] seems to be the only effective way of protecting the rights guaranteed by the Fourth Amendment. It is respectfully submitted therefore that the present formulation of the standing requirement in *Jones* be abandoned in favor of the California rule that a defendant has standing to object to the admission against him of *any* unconstitutionally seized evidence. See Comment, 34 U. Chi. L. Rev. 342 (1967); Note, 1965 Wash. U.L.Q. 488, 518-20. Only in this way can the "reasonable expectations" of the people to be let alone be realized.

Conclusion

The case should be remanded to the District Court for the purpose of conducting an adversary hearing to determine whether any evidence directly or indirectly derived from illegal electronic surveillance in any manner tainted petitioner's conviction. To enable petitioner to vindicate his Fourth Amendment rights, the Government should be required, at or prior to such hearing, to turn over to petitioner and his counsel all records of electronic surveillances which were directed at him, at his codefendant, or at the unindicted co-conspirators. In other words, the petitioner has standing to object to the direct or indirect use

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[27] This rule is consistent with the most recent formulation of the standing requirement by this Court.

> "'The gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Flast* v. *Cohen*, 390 U.S. ——, 88 S. Ct. 1942, 1952 (1968).

It is submitted that any criminal defendant against whom illegally seized evidence is to be introduced has the requisite adverseness.

against him of all of the above records of electronic surveillance, whether or not the surveillances took place at his premises, at the premises of indicted or unindicted co-conspirators, or the premises of innocent third persons, and whether or not petitioner was a party to the overheard conversations.

In the event the Government pleads that national security or the rights of innocent third persons is at stake, the Court in a private hearing attended by petitioner and counsel should adjudicate whether the claim of privilege has been established; if the claim of privilege has been established, then the Court should enter a protective order prohibiting dissemination of the information but continue with the inquiry at a private hearing from which the public but not petitioner or his counsel would be barred. If this course is not satisfactory to the Government, it has the choice of withdrawing or terminating the prosecution it instituted or of submitting to the needs of a civilized administration of criminal justice. Anything less fails to conform with fundamental fairness or to accord petitioner his guarantees under the Fourth and Sixth Amendments and makes these guarantees meaningless.

Respectfully submitted,

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